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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 371

LOUIS SHUB,

Appellant,

vs.

VIVIAN E. SIMPSON,
Secretary of State of Maryland,

Appellee.

MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM AND BRIEF IN SUPPORT THEREOF

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TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Vivian E. Simpson, Secretary of State of Maryland, Appellee in the above entitled cause, respectfully moves this Honorable Court to dismiss the above entitled appeal, or, in the alternative, to affirm the judgment of the Court of Appeals as to the Appellant, Louis Shub, and for reasons in support of said Motion, respectfully represents:

(1) The appeal fails to present any substantial Federal question.

(2) When stripped of the frivolous contentions based on Federal law, the appeal presents only a question of the Construction of a State law under the Constitution of the State of Maryland, an issue not justiciable in this Honorable Court.

The Appellee appends hereto a Brief in support of this Motion.

Respectfully submitted,

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Appellee.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE TO AFFIRM

STATEMENT OF FACTS

This appeal is from a final judgment of the Court of Appeals of Maryland entered October 12, 1950, which affirmed as to the Appellant, Louis Shub, the judgment of the Circuit Court for Anne Arundel County. The opinion of the Court of Appeals is not yet reported officially. The opinion of the Circuit Court for Anne Arundel County will not be officially reported. Both of these opinions are included in the Transcript of Record heretofore filed by the Appellant.

In the Circuit Court for Anne Arundel County, the Appellant filed a Petition seeking the issuance of a Writ of Mandamus to require the Appellee, the Secretary of State

of the State of Maryland, to certify the name of the Appellant on the official ballot to be used at the general election to be held on November 7, 1950, as the gubernatorial candidate of the Progressive Party of Maryland.

The Petition set forth that the Appellant had the requisite constitutional requirements for the office sought, and that he had been duly nominated in accordance with the election laws of the State of Maryland by the Progressive Party of Maryland. The Appellant further alleged that he had properly proffered his certificate of nomination, together with the requisite filing fee to the Appellee, who refused to accept that certificate on the sole ground that it was not accompanied by the affidavit required by Section 15 of Article 85A of the Annotated Code of Maryland, as added by Chapter 86 of the Acts of the General Assembly of Maryland of 1949. Section 15 of Article 85A is a portion of what is commonly known as the Subversive Activities Act of 1949. The Section reads as follows:

> "No person shall become a candidate for election under the provisions of Article 33 of the Annotated Code of Maryland to any public office whatsoever in this State, unless he or she shall file with the certificate of nomination required by the foregoing Article, an affidavit that he or she is not a subversive person as defined in this Article; provided that, in the case of certificates of nomination for President or Vice President of the United States, the affidavit may be made on behalf of such candidates by those persons who file the certificate of nomination for such candidates. No certificate of nomination shall be received for filing by any Board of Supervisors of Elections or by the Secretary of State of Maryland unless accompanied by the affidavit aforesaid, and there shall not be entered upon any ballot or voting machine at any election the name of any person who has failed or refused to make the affidavit aforesaid."

The term "Subversive Person" is defined in the Subversive Activities Act of 1949, as follows:

> "* * * any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the Government of the United States, or of the State of Maryland, or any political sub-division of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization."

To this Petition the Appellant filed a Demurrer, the legal effect of which was to admit all allegations of fact. A hearing was held on the Demurrer and the Demurrer was sustained without leave to amend and the Petition for the issuance of a Writ of Mandamus dismissed. Inasmuch as the matter related to the general election to be held on November 7, 1950, an immediate appeal was taken to the Court of Appeals of Maryland where the case was advanced and argument heard thereon on October 12, 1950. By a *per curiam* order entered that same day, the Court of Appeals affirmed the judgment of the Circuit Court for Anne Arundel County in so far as it applied to the Appellant Louis Shub. The Court of Appeals reversed the judgment of the Circuit Court for Anne Arundel County in so far as it applied to the candidate of the Progressive Party for member of the House of Representatives of the United States for the Second Congressional District. The judgment of the Court of Appeals of Maryland as to the Progressive party candidate for Representative is the subject matter of a Petition for Certiorari being filed contemporaneously herewith.

JURISDICTIONAL STATEMENT

The Appellee adopts the jurisdictional statement heretofore filed by the Appellant.

BASIS OF APPEAL

In the Circuit Court for Anne Arundel County, the Court of Appeals of Maryland (which is the court of last resort of the State of Maryland), and in this Court, the Appellant makes the following contentions to show that Section 15 of Article 85A of the Annotated Code of Maryland, as added by Chapter 86 of the Acts of the General Assembly of Maryland of 1949 is unconstitutional:

It is contended that Section 15 is repugnant to the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States as constituting an unconstitutional interference with freedom of thought and freedom of speech. It is also contended that the oath required by Section 15 of Article 85A, supra, is repugnant to the due process clause of the Fourteenth Amendment to the Constitution as being too broad, vague and indefinite. Further, it is contended that the oath required by Section 15 of Article 85A, supra, is unconstitutional as providing for guilt by association. Lastly, it is contended that the oath required by Section 15 of Article 85A, supra, is an unconstitutional bill of attainder.

The Appellant contends that each of these constitutional contentions is so lacking in merit as to be frivolous and that when the decision of the Court of Appeals of Maryland is stripped of such frivolous claims it appears that the Court of Appeals of Maryland has decided a matter of State law not involving any Federal rights and, therefore, this appeal does not properly lie.

ARGUMENT

THE OATH REQUIRED BY SECTION 15 OF ARTICLE 85A IS NOT AN UNCONSTITUTIONAL INTERFERENCE WITH FREEDOM OF THOUGHT AND FREEDOM OF SPEECH.

Section 15 requires that a candidate for election file with his certificate of nomination an affidavit that he is not a subversive person. Unless such an affidavit is filed, the name of the candidate may not be printed on the official ballot. As pointed out, however, in the Brief supporting the Petition for a Writ of Certiorari in *Simpson v. Gerende*, concerning the same subject matter, the provisions of Section 15 do not apply to all candidates for public office, in that Section 15 has no application to write-in candidates.

From the quoted provision of the law defining the term "Subversive person", it appears that the oath required by Section 15 is to the effect that the candidate seeking to have his name printed on the official ballot does not commit, attempt to commit, aid in the commission, or advocate, abet, advise or teach the overthrow, destruction or alteration of the constitutional form of government of the United States or of the State of Maryland by revolution, force or violence. The oath also requires that such a person swear that he is not a member of a subversive organization or foreign subversive organization having those aims.

At the outset, it is apparent that Section 15 does not attempt to regulate freedom of thought. Unlike the oath required by Section 9(h) of the Labor Management Relations Act of 1947, it is a bare oath that the candidate does not commit any overt act having as its aim the overthrow, destruction or alteration of the constitutional form of government of the United States or of the State of Maryland by revolution, force or violence. One can make an oath as to overt acts and leave his beliefs unaffected. The Appel-

lant, therefore, can complain only to the extent that the oath precludes overt acts founded on revolutionary, forcible or violent beliefs.

The Appellant proceeds on the assumption that the constitutional guarantee of freedom of speech is absolute, and that this freedom may not be denied under any circumstances. Such is not the law as laid down by this Court. It is at once apparent that freedom of speech is not an absolute, but under extraordinary circumstances may be subject to modification.

That the type of regulation attempted by Section 15 is fully constitutional and valid seems established from a line of cases beginning with *Schenck v. United States*, 249 U. S. 47. *Gitlow v. New York*, 268 U. S. 652, concerned the constitutionality of the Criminal Anarchy Law of New York. That law defined criminal anarchy as the doctrine that organized government should be overthrown by force or violence, and the advocacy of such doctrine was made a felony. In the *Gitlow* case, the Act was held constitutional.

Similarly in *Whitney v. California*, 274 U. S. 357, the Criminal Syndicalism Act of California, which defined criminal syndicalism as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage or unlawful acts of force and violence, or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change, was also held constitutional.

The Subversive Activities Act of 1949 is substantially similar to the recently enacted Smith Act, 18 U. S. C. A., sec. 2385. The Smith Act was declared constitutional in *Dunne v. United States*, 138 Fed. 2d 137 (cert. den. 320 U. S. 790) and *United States v. Dennis*, 183 Fed. 2d 201.

See also *American Communications Association v. Douds*, 339 U. S. 382; *State v. Gibson*, 189 Iowa 1212, 174 N. W. 34; *People v. Lloyd*, 304 Ill. 23, 136 N. E. 505; *Barton v. Bessemer*, 234 Ala. 20, 173 Sou. 626; *United States v. Josephson*, 165 Fed. 2d 82; *Foster v. United States*, 80 Fed. Supp. 479.

Thus it is easily demonstrated that the first part of the oath required by Section 15 is that the candidate seeking to have his name printed on the official ballot is fully constitutional.

The portion of the oath required by Section 15 as to membership in subversive organizations or foreign subversive organizations is similarly immune to constitutional attack. Admittedly the bare question, Does advocacy of revolution by violence without overt act present the necessary clear and present danger which appears as a prerequisite to limitation of freedom of speech? has never been squarely decided by this Court (see, however, *American Communications Asso. v. Douds*, 339 U. S. 382 and *Osman v. Douds*, 94 L. ed. (ad. sh.) 905.) Yet all collateral decisions which are available lead inevitably to the conclusion that the question must be answered in the affirmative. Both the *Gitlow* and *Whitney* cases, *supra*, recognize the danger to public peace and security implicit in organizations which advocate the use of criminal and unlawful methods. The Smith Act which was upheld in the *Dunne* and *Dennis* cases, *supra*, contains such a provision. As further authority for the validity of this provision, see also the discussion of Mr. Justice Jackson in *American Communications Asso. v. Douds, supra.*

There is thus obviously no merit in the Appellant's contentions that the oath required by Section 15 of Article 85A, *supra*, constitutes an unconstitutional interference with his freedom of speech.

THE OATH REQUIRED BY SECTION 15 IS NOT REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AS BEING TOO BROAD, VAGUE AND INDEFINITE.

The Appellant's contention in this respect seems fully answered by the decision in *Dunne v. United States, supra.* An analysis of that opinion discloses that the language of the Smith Act and the language of the Subversive Activities Act of 1949 are almost identical. The former was held constitutional in *Dunne v. United States, supra,* and it would seem necessarily to follow that there is no greater valid objection to the latter. Moreover, *Whitney v. California, supra,* stands also as authority for the proposition that the definition of subversive person does not constitute a denial of due process of law because of vagueness or ambiguity. See also *American Communications Asso. v. Douds, supra.*

THE OATH REQUIRED BY SECTION 15 IS NOT UNCONSTITUTIONAL AS PROVIDING FOR GUILT BY ASSOCIATION.

The Appellant employs in his attack on the validity of the oath required by Section 15 of Article 85A, *supra,* what Mr. Justice Jackson, in the *American Communications* case, *supra,* describes as a "cliche" which "has recently entered the dialectic of politics". A similar objection was made in *Dunne v. United States, supra.* The United States Court of Appeals in that case rejected the argument with the statement that guilt is entirely individual and personal.

The same objection was advanced in *Whitney v. California, supra.* There it was held that the joining and furthering of an organization menacing the peace and welfare of the State constituted a sufficient clear and present danger to warrant statutory regulation.

See also *State v. Gibson,* 189 Iowa 1212, 174 N. W. 34; *State v. Tachin,* 92 N. J. L. 269, 106 A. 145; *People v. Lloyd,*

304 Ill. 23, 136 N. E. 505; *Commonwealth v. Widovich*, 295 Pa. 311, 145 A. 295; *People v. Steelik*, 187 Cal. 361, 203 P. 78.

THE OATH REQUIRED BY SECTION 15 IS NOT AN UNCONSTITUTIONAL BILL OF ATTAINDER.

Nowhere is it claimed that the Subversive Activities Act of 1949 operates in any manner except prospectively. The oath requirements of Section 15 and any possible prosecutions for perjury based thereon must necessarily involve punishment for acts committed after the effective date of the Act and not for acts committed before the Act became effective. Thus, *American Communications Asso. v. Douds, supra*, is a complete answer to the Appellant's contention. There it was held that the statute under consideration did not constitute a bill of attainder where it provided for the punishment for acts committed after its effective date, notwithstanding that past conduct was necessarily the foundation for the judgment as to what future conduct was likely to be.

THE ESSENCE OF THE APPEAL IS THE CONSTRUCTION OF A STATE STATUTE UNDER THE STATE CONSTITUTION.

It has been shown above that the Appellant's contentions based on alleged violations of federal rights are totally without merit. Other than these contentions, the Appellant in the Circuit Court for Anne Arundel County and the Court of Appeals of Maryland argued that the oath required by Section 15 violated certain provisions of the Maryland Declaration of Rights and the Maryland Constitution. By affirming the judgment of the lower court in dismissing the Appellant's Petition for a Writ of Mandamus, the Court of Appeals necessarily rejected the contentions based on Federal law and also the contentions based on State law.

In the absence of valid objections involving questions of Federal law, it is axiomatic, without citation, of authority that this Court has no jurisdiction in the premises.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, the Appellee's Motion to Dismiss the Appeal or, in the Alternative, to Affirm the Judgment of the Court of Appeals of Maryland, should be granted.

Respectfully submitted,

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No. 371. SHUB *v.* SIMPSON, SECRETARY OF STATE OF MARYLAND. Appeal from the Court of Appeals of Maryland. *Per Curiam:* The appeal is dismissed on the ground that the federal questions have become moot. *I. Duke Avnet* for appellant. *Hall Hammond*, Attorney General of Maryland, *J. Edgar Harvey*, Deputy Attorney General, and *Harrison L. Winter*, Assistant Attorney General, for appellee. Reported below: 76 A. 2d 332.